BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RODNEY BROWN	)	
Claimant	)	
	)	
VS.	)	
	)	
TEMPLE-INLAND INC.	)	
Respondent	)	Docket No. 1,045,370
	)	
AND	)	
	)	
INS. CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 31, 2009 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard (ALJ).

ISSUES

The ALJ awarded claimant benefits[1] after concluding claimant's vocational activities aggravated and intensified his bilateral knee condition.[2]

The respondent requests review of this preliminary hearing Order and alleges first, that the ALJ had no jurisdiction to issue any order under K.S.A. 44-534a. Second, respondent alleges the evidence fails to establish claimant's assertion that his work activities aggravated, accelerated or intensified his underlying bilateral degenerative knee condition.

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[1] Claimant was awarded both temporary total disability benefits as well as medical treatment with a physician to be selected from a list of three provided by respondent.

[2] ALJ Order (Dec. 31, 2009) at 1.

Claimant argues that the ALJ had the authority to issue the preliminary hearing Order and that the Order should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's preliminary hearing Order should be affirmed.

Claimant has been employed by respondent as a machine operator for the past 27 years. In this job he is required to constantly stand, walk, lift, bend, climb, perch on steel roller conveyors, and move back and forth between machines across a concrete floor and stepping up on a platform[3] during his entire shift.

In 1995, claimant sustained an injury to his right knee. That injury was apparently the focus of a workers compensation claim and after a period of conservative treatment, including a diagnostic MRI and light duty restrictions, claimant was returned to work without restrictions. Claimant suffered ongoing symptoms in his right knee, but continued to work. Then, in 2004, claimant began to notice pain and swelling in his left knee. Again, claimant was provided with conservative treatment, this time with Dr. Thomas Samuelson.

Dr. Samuelson diagnosed degenerative joint disease in the left knee and recommended medications and physical therapy. Dr. Samuelson saw claimant again in December 2005 for complaints to the right knee. He diagnosed degenerative joint disease (as in the left knee) and conservative treatment was offered. In September 2006, claimant was released at maximum medical improvement. Claimant contends that he was told that he would, at some point in time, require bilateral knee replacements but no other treatment was offered at that time.[4]

Beginning in 2004, independent of his treatment with Dr. Samuelson, claimant sporadically sought out treatment from Dr. George E. Stamos who noted the history of bilateral knee complaints as well as claimant's work duties on concrete. On February 27, 2009, Dr. Stamos again noted the progression of claimant's bilateral knee pain and recommended knee replacements. Then, on March 3, 2009, Dr. Stamos' records indicate claimant suffered an increase in symptoms when he stepped off a steel conveyor and his right knee gave out. Dr. Stamos opined that claimant's right knee had mechanical symptoms suggestive of a torn meniscus. On March 31, 2009, an MRI was done which revealed a complex tear of the medial meniscus as well as degenerative changes in the

[3] According to claimant, he moved back and forth between the two machines 300 times over a 5 hour period. (P.H. Trans. (Aug. 25, 2009) at 11).

[4] P.H. Trans. (Aug. 25, 2009) at 33.

medial femoral tibial joint compartment, degenerative changes in the patellofemoral joint and grade IV chrondromalacia in the trochlear groove.

Surgery was suggested for the right knee and claimant was taken off work. He reported this to his employer and was directed to proceed under his private health coverage. This claim followed.

On June 17, 2009, Dr. William O. Hopkins evaluated claimant at his attorney's request. After a review of the records, Dr. Hopkins opined that claimant sustained bilateral knee injuries which includes tricompartmental arthritis as well as an injury to his back. He went on to say that "it is reasonable to assume that 27 years of standing, walking, lifting, carrying, squatting, stooping and climbing are aggravating, accelerating and intensifying his current knee problems and back symptoms."[5] Dr. Hopkins recommended bilateral knee replacements.

When treatment was not forthcoming, claimant proceeded to a preliminary hearing pursuant to K.S.A. 44-534a. That hearing was premised upon a demand that sought an order directing respondent to provide the treatment outlined by Dr. Hopkins. The preliminary hearing was held on August 25, 2009. Following that hearing, the ALJ entered an order referring claimant to Dr. Pratt for an examination to determine whether his alleged condition has been aggravated, accelerated or intensified by his work activities.[6]

Dr. Terrence Pratt examined claimant on October 23, 2009 and issued his report that same date. Dr. Pratt reviewed claimant's extensive medical history and conducted his own examination, as evidenced by his report. He diagnosed claimant with bilateral degenerative joint disease involving the knees, left greater than the right with more severe involvement medially but also patellofemoral involvement.[7] He also noted "changes consistent with a medial meniscus tear involving his right knee" along with some other unrelated conditions.[8]

Dr. Pratt was specifically asked whether claimant's bilateral knee complaints were "aggravated, accelerated, or intensified by his work and to determine if he is a candidate for knee replacement with his current medical condition."[9] In response, he replied as follows:

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[5] *Id.*, Cl. Ex. 4 at 13 (Dr. Hopkins' June 17, 2009 IME report at 11).

[6] ALJ Order (Dec. 31, 2009) at 1.

[7] P.H. Trans. (Dec. 29, 2009), Cl. Ex. 1 at 5 (Dr. Pratt's Oct. 23, 2009 IME report).

[8] *Id.*

[9] *Id.*

> His involvement of the right knee was in relationship to a reported vocationally related event with some involvement of his ACL. He reports being symptomatic since that time. He currently has some degenerative changes as well as a recent event in 2009 with findings suggestive of a medial meniscus tear. It does appear that his right knee involvement was aggravated in relationship to his reported vocationally related activities. It is my understanding that we are discussing a series through April 3, 2009.
>
> In relationship to the left knee involvement, he has degenerative changes. I do not have any documentation that he had a specific vocationally related event in relationship to that and he has had some natural progression of the underlying degenerative changes. It also does appear that he had aggravation in relationship to his reported vocationally related activities in relationship to his underlying degenerative condition involving his left knee. I could not state with a reasonable degree of medical certainty that his work activities result in his degenerative condition.[10]

Dr. Lowry Jones also examined claimant (at respondent's request) and weighed in on this issue. Dr. Jones' notes reference an event in March 2009 which resulted in an injury to the right knee. Although it is not clarified in this record, it appears this is likely the same event that Dr. Stamos described when claimant was stepping off a conveyor belt at work. According to Dr. Jones, that event appears to have left claimant with a complex medial meniscal tear in his right knee.

After his examination and a review of claimant's medical records, he concluded the following:

> His present pain is activity-related of the right knee, and his clinical exam does suggest that he has probable significant pain associated with the meniscal tear. By x-ray he does not have advanced arthritic disease of the right knee.
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> From the standpoint of his left knee, there is no documented history, but he now has had ongoing progressive knee pain for four to five years or more, and he has advanced arthritic disease.
>
> Regarding his work activity, I do believe that his present right knee pain is work-related. I believe that he likely sustained a degenerative meniscal tear associated with his ACL injury in 1995, and he now has a complex medial meniscal tear which should be treated with arthroscopic evaluation. I do not believe he needs to progress directly to a total knee replacement.
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> In regards to his left knee, I believe this is normal progressive degenerative arthritis. I do believe his work conditions would contribute to pain associated with degenerative left knee, but having developed this in his early fifties, it is not, in my

[10] *Id.*, Cl. Ex. 1 at 5-6 (Dr. Pratt's IME report).

> opinion, that every 50-year-old doing his job would result in having degenerative joint disease of the knee. . . . Again, I believe this is a natural progressive degenerative arthrosis. His right knee, however, I believe should be evaluated arthroscopically. He may get significant benefit from partial medial meniscectomy.[11]

Following receipt of Dr. Pratt's report, claimant sought to bring the matter before the ALJ once again for a final ruling. Claimant sent respondent a demand for the treatment outlined by Dr. Pratt along with a request for temporary total disability benefits (TTD) on November 17, 2009. Thereafter, claimant filed an Application for Preliminary hearing on November 23, 2009 and the hearing was held on December 29, 2009.

No testimony was taken at this hearing as the sole purpose was to get a ruling on the compensability of claimant's claim, a finding that had yet to be rendered. Respondent voiced its objection to the ALJ's jurisdiction, asserting that claimant had prematurely proceeded by sending a demand for the treatment outlined by Dr. Pratt on November 17, 2009 and proceeding to file for a preliminary hearing one day early, before the expiration of the seven day period set forth in K.S.A. 44-534a. Respondent also contended that the greater weight of the medical evidence failed to support claimant's assertion that he had sustained a series of repetitive injuries as a result of his work activities. Respondent also suggested that rather than a series, the medical records seemed to indicate claimant had suffered a single, acute injury in early March 2009, an allegation that was not presently encompassed by the claimant's claim.[12]

After hearing statements of counsel and considering the evidence offered including the earlier transcript testimony from the August 25, 2009 proceedings, the ALJ issued his Order. That Order overruled respondent's jurisdictional objection and granted claimant's request for medical treatment and TTD benefits. The ALJ reasoned that "[t]he Court retains jurisdiction based on the earlier 7-day letter when the Order was entered authorizing an independent medical examination with Dr. Terrence Pratt."[13] As for the causal connection between claimant's uncontroverted need for treatment and its connection to his work activities, the ALJ concluded that "[b]ased upon the reports of Drs[.] Jones and Pratt it is herein determined claimant's vocational activities aggravated and intensified his condition and as such claimant is entitled to medical care."[14]

Respondent's appeal followed and reasserted the same arguments as were presented at the December 29, 2009 hearing. Given respondent's objections at the

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[11] *Id.*, Resp. Ex. A at 2-3 (Dr. Jones' Aug. 28, 2009 IME report).

[12] *Id.* at 5-6.

[13] ALJ Order (Dec. 31, 2009) at 1.

[14] *Id.*

hearing, the jurisdictional challenge to the underlying preliminary hearing Order must first be addressed.

K.S.A. 44-534a makes applicable to both claimant and respondent the specific criteria and procedures required to proceed to preliminary hearing for purpose of medical treatment and payment of temporary total disability compensation. That statute requires a "notice of intent" setting forth the benefits being sought.[15] After the expiration of 7 days, if those benefits are not forthcoming, the requesting party can file application for preliminary hearing which is then held.[16]

There is no dispute that this procedure was followed in connection with the August 25, 2009 proceedings. However, instead of ruling on the substantive issue presented, the ALJ decided that claimant should undergo an independent medical examination pursuant to K.S.A. 44-516.[17] That decision was well within his jurisdiction and was not an appealable Order.[18]

The difficulty here is that after receipt of the IME report from Dr. Pratt, claimant still had yet to receive a decision from the ALJ. And as his counsel recognized at the December 29, 2009 hearing, he could have merely asked for a telephone conference as a means to bring the issue to fruition but instead, he went the extra step and served a notice of intent upon respondent. And while claimant's most recent application for preliminary hearing was filed just one day short of the 7 day period set forth in the statute, it was claimant's belief that he was merely completing the original preliminary hearing process and was not starting anew.

The Board has, in the past, recognized the ALJ's right to do precisely what was done in this case. And in doing so, the Board has recognized the ALJ's continued jurisdiction over the claim pending receipt of an IME report. For whatever reason, the ALJ did not take this matter up on his own and claimant elected to set another hearing. While the methodology has somewhat clouded the record, it is clear that the ALJ had yet to rule on the issues squarely presented at the August 25, 2009 preliminary hearing. He had taken the matter under advisement and sought additional information from Dr. Pratt. That information was subsequently submitted and as a result, an order was issued on December 29, 2009. The fact that another notice of intent was served did not invalidate the claimant's original filing. Accordingly, the ALJ's decision to overrule respondent's objection to jurisdiction based upon K.S.A. 44-534a is affirmed.

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[15] K.S.A. 44-534a

[16] *Id.*

[17] ALJ Order (Dec. 31, 2009) at 1.

[18] *Woodcox v. City of St. Francis*, No. 1,025,082, 2008 WL 924547 (Kan. WCAB Mar. 12, 2008).

Turning now to the substantive issues, this Board Member finds the ALJ's decision to grant claimant's request for medical treatment for his bilateral knee conditions should be affirmed. Claimant is alleging a series of accidents commencing January 2006 to April 3, 2009 (his last date of work). The physicians, Drs. Hopkins, Jones and Pratt all seem to agree on claimant's diagnosis and that he should have his left knee replaced and possibly his right, although one physician suggests more conservative treatment to repair the tear. As for the cause of those conditions, there is some agreement on that as well.

Dr. Hopkins has opined that claimant's work activities are "aggravating, accelerating and intensifying his current knee problems".[19] Dr. Pratt reported that claimant's right knee problems were "aggravated" by his work activities.[20] As for the left knee, he indicated that it appeared claimant had an "aggravation" to his right knee as a result of work duties.[21] To be clear, Dr. Pratt did not believe that work *caused* claimant's degenerative knee condition. Rather, he believed that work aggravated his condition.

Dr. Jones also weighed in but was somewhat confusing in his opinions. He indicated that he believed that the pain in claimant's right knee was work-related. But as to the left knee he was rather equivocal. Although he says that he believes the condition in claimant's left knee reflects normal progressive degenerative arthritis, he goes on to say that claimant's work conditions would contribute to the pain associated with that condition.

This evidence, coupled with claimant's uncontroverted assertions that when working, he is required to stand on concrete and is constantly in motion, moving back and forth between machines, stepping up and down, persuades this Board Member that claimant's bilateral degenerative condition was aggravated, accelerated or intensified by his work duties over a period beginning in January 2006 and ending on April 3, 2009. Accordingly, the ALJ's Order is affirmed in every respect.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[22] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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[19] P.H. Trans. (Aug. 25, 2009), Cl. Ex. 4 at 13 (Dr. Hopkins' June 17, 2009 IME report at 11).

[20] *Id.* (Dec. 29, 2009), Cl. Ex. 1 at 5 (Dr. Pratt's IME report).

[21] *Id.* at 5-6

[22] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated December 31, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge